PUBLIC PROSECUTOR

v.

YAHYA SALLEH & ANOTHER CASE

HIGH COURT MALAYA, SEREMBAN
MUSTAPHA HUSSAIN J
[CRIMINAL TRIAL NOS. 3 & NO. 4 OF 1984]
24 JANUARY 1987

CRIMINAL LAW AND PROCEDURE: *Offence under s. 39B(1)(a) of Dangerous Drugs Act 1952 - Joint trial as facts similar - Defence - Whether acceptable - Applicability of s. 114(g) of Evidence Act 1950 - Case - Whether proved beyond reasonable doubt.*

Both the accused travelled from Pasir Mas in a train which was headed towards Gemas and Johore Bahru. Police officers followed the accused and arrested them at Gemas railway station where the accused changed trains. They were carrying bags which contained cannabis. Another person, one Syed Omar, was also arrested but he could not be produced as a witness because he could not be traced.

Held:

[1] It had been proved, beyond any doubt, that the chemist was an expert.

[2] The defence of bare denial was not acceptable. The Court found that the three prosecution witnesses were telling the truth in a straightforward manner. The defence allegation that the accused were caught empty-handed was unbelievable.

[3] As to the non-calling of Syed Omar, the presumption of s. 114(g) of the Evidence Act could not be applied as Syed Omar "could not be produced"; s. 114(g) is about "**evidence which could be but not produced**".

[4] Both the accused were telling a pack of lies. Moreover, the defence had not rebutted the statutory presumptions on a balance of probability, nor had the defence of both the accused created or raised any reasonable doubt in the case for the prosecution on the whole.

[Both accused sentenced to death.]

Case referred to:
Patel v. Comptroller of Customs [1965] 3 WLR 1221

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da)
Evidence Act 1950 ss. 114illus.(g)

For the public prosecutor - Mohd. Zaki bin Md. Yasin, DPP
For the accused Yahya (assigned) - Amir bin Ismail (Goh and Americk Singh Sidhu with him)
For the accused Mat Jusoh (assigned) - Ibrahim bin Ismail

JUDGMENT

Mustapha Hussain J:

The charge against the accused Yahya bin Salleh read:

> That you on 18 March 1984 at 12.10 a.m. at Gemas Railway Station in the District of Tampin in the State of Negeri Sembilan, on your own behalf, did traffic in a dangerous drug, to wit, cannabis weighing 3,798 grammes, in contravention of the provisions of s. 39B(1)(a) of the Dangerous Drugs Act, 1952, and that you have thereby committed an offence punishable under s. 39B(2) of the same Act.

The DPP Encik Mohd. Zaki bin Md. Yasin was for the prosecution while Encik Amir bin Ismail was assigned to defend the accused, assisted by Encik Goh and Encik Americk Singh Sidhu.

The charge against the accused Mat Jusoh bin Kassim read:

> That you on 18 March 1984 at 12.10 a.m. at Gemas Railway Station in the District of Tampin in the State of Negeri Sembilan, on your own behalf, did traffic in a dangerous drug, to wit, cannabis weighing 3,837 grammes, in contravention of the provisions of s. 39B(1)(a) of the Dangerous Drugs Act, 1952, and that you have thereby committed an offence punishable under s. 39B(2) of the same Act.

The DPP Encik Mohd. Zaki bin Md. Yasin was for the prosecution while Encik Ibrahim bin Ismail was assigned to defend the accused.

Since the offences and facts of both charges arose out of the same transaction, the learned DPP applied for joint trial of the two cases. The learned Counsel for the two accused agreed and the Court ordered the joint trial.

For convenience of reference with the agreement of all Counsel, the accused in Criminal Trial No. 3 of 1984 Yahya bin Salleh will be called "the 1st accused" and the accused in Criminal Trial No. 4 of 1984 Mat Jusoh bin Kassim will be called "the 2nd accused".

As the two accused were Kelantanese Malay, a special interpreter conversant in the Kelantanese Malay dialect was called to assist in the interpretation of all the proceedings in the trial.

The Case for the Prosecution

On 17 March 1984 in the morning, Inspector Othman bin Harun (PW1) of the Kelantan police anti narcotics branch, received certain information pertaining to drugs. He gathered three of his men consisting of DPC Abu Bakar, DPC Hashim and DPC Arshad and proceeded to Gua Musang railway station to await the train coming from Pasir Mas from the north and going towards south to Gemas and Johor Bahru. The train from Pasir Mas arrived at Gua Musang at about 3.10 p.m. Inspector Othman (PW1) instructed DPC Arshad to get into the train and check on the suspects by their physical features and clothing description of which were given in the information. DPC Arshad located the two suspects sitting in a coach in the ordinary class. Inspector Othman and DPC Arshad then boarded the train and sat in the same coach as the two suspects while the other two DPCs sat in the coach in front. (see sketch plan drawn by Inspector Othman P3 showing the seating positions). Inspector Othman (PW1) sat at place in coach 3 (K3) marked A1 and DPC Arshad (PW3) sat at place in coach 3 (K3) marked A4. DPC Abu Bakar sat in coach no. 4 (K4) at place marked A2. DPC Hashim sat in coach 5 (K5) at place marked A3.

The two suspects, i.e. 1st suspect sat in coach 3 (K3) at place marked B1, while the 2nd suspect sat next at place marked B2.

Inspector Othman (PW1) kept close observation on the two suspects while the train was moving south, he also observed that the two suspects did at times, leave their seats but not together. Both suspects were seated next to each other, and they were observed conversing with each other. Inspector Othman (PW1) said he did not see the two suspects carrying anything but he saw there were a few bags placed on the luggage racks above the two suspects' heads. Three photographs of the coach were later taken and produced as P4 A-C.

The train arrived at Gemas railway station at about 12.10 a.m. the next day i.e. 18 March 1984, just past midnight of 17 March 1984. Inspector Othman (PW1) observed that the two suspects remained seated for about three minutes. Then the 1st suspect (B1) stood up and combed his hair and the 2nd suspect (B2) also stood up. Then the 1st suspect (B1) took a bag from the luggage rack above him, and the 2nd suspect (B2) also took a bag from the luggage rack above. Each of them, carrying a bag each, went out of the train. There was also another male Malay who was following them out of the train. They got down to the platform on the left and walked across and boarded another train that had come from Kuala Lumpur which was already there and which was leaving for Johore Bahru earlier than the train which had come from Kelantan.

Inspector Othman (PW1) and his three DPCs followed the two suspects B1 and B2 and also the other Malay, who went up into the other train. Both the suspects B1 and B2 carrying a bag each, and the other male Malay, boarded the other train and went inside the coach and finding no vacant seats, they turned back towards the front of the coach where the coach joined another coach. Inspector Othman (PW1) and his three DPCs were at that place and immediately sprang into action and arrested the two suspects B1 and B2. Inspector Othman and DPC Arshad arrested the 1st suspect (B1) who was later identified as 1st accused Yahya bin Salleh. 1st accused Yahya bin Salleh was still carrying a bag when he was arrested. The bag was later identified as Exhibit P6 containing dried leaves suspected to be cannabis.

Similarly, the 2nd suspect (B2), later identified as the 2nd accused Mat Jusoh bin Kassim, when arrested by DPC Abu Bakar and DPC Hashim was holding on a bag which was later identified as Exhibit P7, also containing dried leaves suspected to be cannabis. The other male Malay was also arrested but he had nothing on him. This 3rd male Malay was one by the name of Syed Omar, a Thai national. A sketch plan showing the two trains and movements of the two suspects (B1) and (B2) and the police party is shown in Exhibit P5.

After the arrests, all the three were brought to the Railway CID room at Gemas railway station where Inspector Othman (PW1) opened the two bags P6 and P7 to examine the contents, which was done in the presence of both the accuseds, a fact elicited in cross- examination though not adduced by the prosecution.

The cross-examination of Inspector Othman (PW1) elicited that the coach No. 3 was full. Nothing favourable to the defence was elicited in the cross-examination except to clarify that the Gemas railway station had lights on. The Court had visited the Gemas railway station on the midnight of 21 October 1986 when some fluorescent lamps in the railway station were not working. However, the cross-examination elicited the fact that on the night of the incident the lights were on and working.

The next witness for the prosecution (PW2) was the assistant station master of Gemas railway station by the name of Abdul Hakim bin Nordin, who stated that the station was full of passengers and crowded. The station was well lighted on the night of the incident. However this witness was sure that the train from Kuala Lumpur arrived four minutes later i.e. after the train from Kelantan had arrived.

The 3rd witness for the prosecution was DPC Arshad bin Ismail (PW3). This witness corroborated the evidence of Inspector Othman (PW1) in particular that when 1st accused Yahya bin Salleh was arrested by him and PW1, the 1st accused was carrying the bag P6 in his right hand. This witness also said he witnessed DPC Hashim and DPC Abu Bakar arresting the 2nd accused Mat Jushoh bin Kassim who was carrying the bag P7 and when arrested 2nd accused did put up a struggle.

The next prosecution witness was DPC Abu Bakar bin Othman (PW4). This witness corroborated the evidence of PW1 and PW3. He and DPC Hashim effected the arrest of 2nd accused Mat Jusoh bin Kassim, who was carrying the bag P7.

The next witness for the prosecution was Mr. Lau Cheng Siew (PW5) the government chemist from the chemistry department at Petaling Jaya. The two bags P6 and P7 were sent to this witness for analysis and after conducting the tests and analysis, it was found that the contents of P6 were cannabis as defined in s. 2 of the Dangerous Drugs Act as amended, weighing 3,798 grammes net of cannabis. In P7 the cannabis was found to be of net weight of 3,837 grammes.

Defence Counsel Mr. Americk Singh Sidhu cross-examined the chemist on behalf of Counsel for both accused. It was established in cross-examination (though not by the prosecution which only stated he was a chemist and nothing else) that this witness had a hons. degree from the university of Malaya in chemistry and had extensive on-job training and special training in analysing cannabis in particular. It was also established in cross-examination that this witness had been giving expert evidence on drugs in the High Court as well as in the lower Courts and whose evidence had been accepted by the Courts. After very lengthy cross-examination on his expertise and his experience and all the tests he had carried out, it was established conclusively beyond doubt that the contents of the two bags P6 and P7 were cannabis weighing 3,798 grammes and 3,837 grammes respectively. There were indeed some doubts as to this chemists's qualifications as an expert as the prosecution in examination-in-chief had only established he was a chemist in the chemistry department and nothing more. The doubts were cleared by questions in cross-examination which helped to establish that he was an expert in analysing drugs especially cannabis.

Then we had Inspector Che Azmi bin Bidin (PW6), anti narcotics officer in Tampin. He received a call from PW1 Inspector Othman about the arrest of the two accuseds and that other Thai national. He took over the exhibits and handed the two accuseds and the Thai national with the exhibits to IO of the case ASP Roy Arumugam (PW7). ASP Arumugam, now retired from service, was the IO of the case. He took possession of the exhibits and the two accuseds with the Thai national, arrange the exhibits to be sent to the chemistry department for analysis. There was the police photographer (PW8) DPC Baharuddin bin Daud who took photographs of the railway coaches and produced as Exhibits P4A to C.

The last witness for the prosecution was Inspector Ahmad Asri bin Jamaluddin (PW9) of the anti narcotics branch of Kelantan police in Rantau Panjang which is on the border with Thailand. This witness was called to give evidence that the Thai national Syed Omar bin Syed Hassan could not be traced and served with the subpoena to be a witness in this case despite several attempts by the Thai police to do so.

Court's Decision at the Close of Case for Prosecution

All Counsel for defence did not submit of no case to answer or at least say as in other criminal trials that the prosecution had not made out a *prima facie* case.

The Defence only submitted on one point, i.e. that the chemist (PW5) in answers to the questions by learned defence Counsel had stated that he had weighed all the bundles with the sticks before doing the chemical DL test. Going through the chemist's evidence very carefully, the chemist in no uncertain terms, testified that the net weight of cannabis in P6 was 3,798 grammes, and the net weight of cannabis in P7 was 3,837 grammes; both weights were exclusive of the weights of the fibres and the bamboo slivers. The chemist also testified

from the tests he carried out, it was conclusive that the materials were cannabis, and that the weights he found were also conclusive. I have no reason at all to doubt the testimony of the chemist.

Both the accuseds were arrested with the bags on them, 1st accused carrying P6 and 2nd accused carrying P7, both of which contained cannabis. Cannabis is a dangerous drug as listed in the 1st Schedule to s. 2 of the Dangerous Drugs Act 1952. Under s. 37(d) of the said Act any person found to have the custody or control of anything whatsoever containing dangerous drugs shall be deemed to have been in possession of such drug and until the contrary is proved, be deemed to have known the nature of such drug. The two bags are within the meaning of "anything". Both the accuseds were carrying the two bags and they had the custody of the bags. The two bags *viz.* P6 contained 3,798 grammes and P7 contained 3,837 grammes of cannabis. Under s. 37(da) if the cannabis is 200 grammes or more in weight, the persons found in possession shall be presumed to be trafficking in the said drug.

By the aids of these statutory presumptions, this Court found that a *prima facie* case had been made out by the prosecution against the two accuseds, which if unrebutted, would warrant the conviction of both the accuseds on the charge against each of them.

I therefore called upon the 1st accused and the 2nd accused to enter their defence on the charge against each of them.

The Defence

Both the accuseds gave evidence on oath. 1st accused Yahya bin Salleh (DW1), said he was a labourer working in a construction site in Jalan Taman Tebrau in Johor Bahru for about a month. He had come home to Kota Bharu for about 15 days and was on his way back by train to Johor Bahru on that fateful night in question, i.e. on the 17 & 18 March 1984. He did not carry anything at all, not even his clothings. On reaching Gemas railway station, he got off the train and hearing the announcement that the other train from Kuala Lumpur would leave earlier than the one he had come from Kelantan, he crossed the platform and went into one of the coaches of the other train. He went inside and seeing no vacant seats, he turned back towards the front to the place where the coach joined the other coach, where he was arrested by Inspector Othman (PW1) and DPC Arshad (PW3). He was handcuffed and brought back to the coach of the train in which he had travelled from the east coast. Then one of the police personnel took down the two bags (P6 and P7) from the luggage racks, placed them in front of him and started asking the 3 or 4 passengers seated in the coach to whom the bags belonged to. On getting no reply, the police asked the 1st accused. The police asked 1st accused to admit that the bags belonged to him. He was then taken into the railway CID room at the Gemas railway station, still handcuffed, made to squat facing the wall while the police opened and examined the two bags. He categorically denied any knowledge of the bags, and denied having carried any of the two bags. One being asked by the DPP why the Police witnesses had testified that he was carrying one of the bags, P6, he said that the police had famed him up.

The 2nd accused Mat Jusoh bin Kassim (DW2) said that 1st accused was his friend and together they were working on a construction site at Jalan Taman Tebrau in Johor Bahru. He too, had come home to Kota Bahru, for about 14 days and like his friend the 1st accused, he too was on his way back to work in Johor Bahru. 2nd accused also said that he did not carry any bag at all, not even his personal belongings. When the train stopped at Gemas railway station, he too alighted and with the 1st accused went to the other train as that train was leaving for Johor Bahru earlier. On seeing all the seats in the other train being occupied,

he turned back to go to the front coach and at the spot where the two coaches joined, he was arrested by PW4 and another detective. He was handcuffed and brought back to the coach of the train in which he had travelled from the east coast. The police took the two bags down from the luggage rack and asked 3 or 4 passengers seated in the coach to whom the bags belonged to. 2nd accused was also asked to admit that one of the bags belonged to him.

2nd accused too was taken into the CID room at Gemas railway station, made to squat down facing the wall, while the police opened the bags to examine the contents. 2nd accused categorically denied any knowledge of the bags, let alone, having carried one of the two bags. On being asked by the DPP why the police had testified that he was carrying one of the bags P7, he too said he was framed up by the police.

Finding of Court at the End of Defence

At the end of the case for the defence, the learned Counsel for the defence submitted that the evidence of the two accuseds has raised a reasonable doubt in the case for the prosecution with regard to the carrying of the two bags (P6 and P7). They also submitted on the non-production of the Thai national, invoking s. 114(g) of the Evidence Act. One of the Counsel for the defence in his submission stressed that the chemist (PW5) during the tests he carried out on the plant material to determine whether the plant material was cannabis, had used samples supplied by the United Nations for comparison. The samples from the United Nations had labels on them. It was submitted by the learned Counsel that these labels on the samples were hearsay and that no one from the United Nations had come to Court to prove that the contents in the containers were what their labels described.

The Court had to consider this point before proceeding to consider the rest of the defence. In this respect the Court is aware that when the contents of a receptable are the subject matter of the charge itself, then evidence must be led to prove that the contents are what their labels specified. I am fully aware of the Privy Council case of *Patel v. Comptroller of Customs* ([1965] 3 WLR 1221), which can be differentiated from the samples used for tests as distinct from the contents which form the subject matter of the charge which naturally must be proved beyond any reasonable doubt.

From the evidence of the Chemist (PW5) I was satisfied beyond any doubt at all that the materials he tested were cannabis and conclusively cannabis as defined under s. 2 as amended of the Dangerous Drugs Act 1952.

In my considered view, there was no need for the chemist (PW5) to produce and prove every single equipment, every single glass plate, every single balance, every single chemical apparatus and other equipments in his laboratory. As long as the chemist was qualified and an expert in this field and he had carried out the standard tests and if the Court is satisfied of his expertise and experience, then the Court can accept his expert evidence.

Must the chemist bring all the glass plates, all the test tubes, the weights and balances, the chemicals and other laboratory equipments used in the tests to the Court? Again, must the manufacturers of such glass plates and test tubes from Europe, and the makers of the weights and balances from all parts of the world come to prove what they manufacture or make? Again, the producers of the various chemicals, have they to come from Switzerland to give evidence that the chemicals were indeed the chemicals they produced?

The chemist (PW5) had been proved, beyond any doubt, that he was an expert, he held a Hons. degree in chemistry and he had undergone on-job training for the analysis of cannabis and that he had given expert evidence in the High Courts as well as in lower Courts, and his evidence as an expert had been accepted by the Courts. He had carried out the standard tests to determine conclusively that the plant material was cannabis and also as to the weights. The fact that he was not a botanist, that the laboratory equipments in which the tests were carried out were not produced in Court and that the samples for comparison, the labels, the chemicals used, the balance, and all the paraphernalia in his laboratory were not produced in Court, did not in any way detract the fact that a proper and full analysis was carried out and so carried out which culminated in the plant material found in P6 and P7 being conclusively proved to be cannabis weighing 3,798 grammes in P6 and 3,837 grammes in P7, respectively.

We are dealing with expert evidence. The materials this expert used, the chemicals and the equipments used for carrying out the experiments, the accuracy of the balance, are all part and parcel of the expert's work in the chemistry department and all these as performed are **in the course of the business** of the expert in the chemistry department.

The Court therefore had no doubts at all in the evidence of the chemist and accepted his evidence.

And now to the defence. The Court very carefully considered the evidence of the defence. The defence of both the accuseds was one of **denial**. They said they were not carrying the bags P6 and P7 and the police had framed them up. In such a defence as this, the Court will have to scrutinise again the evidence of the three prosecution witnesses, i.e. PW1 Inspector Othman, PW3 DPC Arshad and PW4 DPC Abu Bakar, to find out if there was any evidence or indication that these three witnesses had gone out of their way to lie in a Court of law and put two innocent men to the peril of their lives, bearing in mind the seriousness of the charge against the two accuseds. On very careful consideration of the evidence of all the three witnesses for the prosecution in the light of the evidence of both the accuseds, I found, as a fact, that they, the three prosecution witnesses were telling truthfully in a straightforward manner that they had seen both the accuseds, each carrying a bag and when they arrested the two accuseds, each of them, i.e. 1st accused was carrying the bag P6 and that the 2nd accused was carrying the bag P7. I had no reason whatsoever to suspect or even doubt their testimony. As a fact, I found PW1, PW3 and PW4 were witnesses of truth.

On the other hand, the defence allegation that they were caught empty-handed and were brought back to the coach in which they had travelled from the east coast and the police asked 3 or 4 passengers seated in the coach whether the two bags belonged to them, and had forced the two accuseds to admit that the two bags belonged to them, was a mere fabrication and too far fetched. Why should the police choose the two accuseds in particular, instead of two of the 3 or 4 passengers who were seated in the coach? The 1st accused went further and asked in reply to a question by the DPP why the police had not arrested him while he was in Gua Musang or while in the train and had waited until they reached Gemas when he was on the other train to arrest him. This precisely confirmed that the police had to move in and arrest only when he was actually carrying the bag, which the police in fact did.

On the question of both the accuseds being asked to squat facing the wall while the two bags were being opened for inspection in the CID room at Gemas railway station, why should they be asked to face the wall when the police was in the process of opening and examining the two bags at their back. There was no earthly reason for this.

Again, according to the two accuseds, they had only seen the two bags for the first time when the two bags were placed in front of them after they were arrested and brought back to the coach they had travelled from Kelantan. And in the CID room, they only had a glance at the bags as their faces were to the wall; yet on being asked by their own respective Counsel to show which bag each was accused of carrying, they had stepped out of the witness box and identified the respective bags correctly and positively which the police had stated they were each carrying. Strange they could positively identify the bags after having had only two glances at them. And stranger still,they did not carry anything at all, not even their personal effects like shirts or towels when both of them were going to work at that far off place in Johor Bahru for about one month and had come home to Kota Bharu for two weeks furlough. The 2nd accused had brought his clothings when he went back to Kelantan. One would have expected some clothings to be brought back after all they were going to work in Johore Bahru for some time.

On the contention that Syed Omar, the Thai national, was not called to give evidence or made available to the defence, the prosecution had adduced ample evidence that this Syed Omar, could not be traced. Efforts were made even to detain him but were unsuccessful. I do not see how the presumption of s. 114(g) can be applied as Syed Omar's "could not be produced". Section 114(g) talks about "**evidence which could be but not produced**".

In any event, defence had asked the IO whether this Syed Omar was important to the prosecution's case to which the IO had replied yes. Again, both accuseds had stated they did not know Syed Omar at all. I cannot see then how this Syed Omar's evidence could throw any light in this case except to strengthen the case for the prosecution further.

I had very very carefully considered the defence, bearing in mind always that the onus on the defence was very slight i.e. as far as the statutory presumption was concerned, it was merely to rebut the presumption on the balance of probability. As regards the facts of custody i.e. the carrying of the two bags, the defence only had to create a reasonable doubt in the case for the prosecution. And to the whole of the prosecution's evidence all that the defence needed to do, was to raise or create a reasonable doubt on the prosecution case.

Considering the evidence in its entirety, I found, as a fact, that both the accuseds were telling a pack of lies. I found as a fact that the defence had not rebutted the statutory presumptions on a balance of probability, nor had the defence of both the accuseds created or raised any reasonable doubt in the case for the prosecution on the whole.

I therefore found the 1st accused guilty of the charge against him and I also similarly found the 2nd accused guilty of the charge against him. Accordingly I convicted them on the respective charge against each of them.

Sentence

The law provides only one sentence in cases of this nature, which is the mandatory sentence of death. I therefore passed the mandatory sentence of death on the two accuseds.

Also found at [1987] 2 CLJ 248